Crl.A. 281/2001
BEFORE
THE HON'BLE MR JUSTICE D. BISWAS, CHIEF JUSTICE (ACTING)

IN THE GAUHATI HIGH COURT
(The High Court of Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram and Arunachal Pradesh)

CRIMINAL APPEAL NO.281 OF 2001

1. Smt. Phuljhari Devi,
W/O Late Tejkukar
R/O Bhoju Road, Sonari Town,
P.S. Sonari,
Dist. Sivasagar.

2. Sri Deva Kumar,
S/O Late Marakanda Kumar,
R/O Bhaju Road,
Sonari Towm,
P.S. Sonari,
District - Sivasagar.

& &.. APPELLANTS

- Versus -

State of Assam

& &.. RESPONDENT

P R E S E N T

HON'BLE MR. JUSTICE D. BISWAS, CHIEF JUSTICE (ACTING)

For the appellants : Mr. P. Bora,
Advocate.

For the respondent : Mr. K.C. Mahanta,
Public Prosecutor, Assam

Date of Hearing : 05.01.2007

Date of Judgment and Order : 19.1.2007

JUDGMENT AND ORDER

(CAV)

This appeal is filed against the judgment and order dated 13.8.2001 passed by the learned Special Judge, Sibsagar in Special (N.D.P.S.) Case No. 1/1996 convicting both the appellants under Section 18(b) of the NDPS Act and sentencing each of them to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.1 lakh. In default, the appellant No.1 has been sentenced to undergo rigorous imprisonment for three months and the appellant No.2 to undergo rigorous imprisonment for six months.

2. I have heard Mr. P. Bora, learned counsel for the appellants and also Mr.K.C. Mahanta, learned Public Prosecutor, Assam.

3. Mr. P.Bora, learned counsel for the appellants argued that the seizure of the opium from the alleged possession of the appellants has not been in accordance with the provisions of law, the seizure is not supported by any independent witness, the evidence of PW 1, Inspector of Excise, is not adequate enough to warrant conviction without corroboration from independent source, and that the confessional statements of the appellants are inadmissible in evidence. That apart, Mr. Bora submitted that the learned Special Judge has not considered the defence evidence, particularly the evidence of DW 1 which would show that the appellant Shri Deva Kumar lives in a separate house and was in no way connected with the alleged offence.

4. PW 1 Shri Bhaben Sarma, Inspector of Excise, Sonari along with other officers conducted a search in the house of the appellants situated at Sonari Town and seized 640 grams of opium vide Ext.1 kept concealed in two different places in two polythene bags. The Excise Inspector also seized a sum of Rs.2,300/- alleged to have been the sale proceeds of the opium. On being interrogated, both the accused persons made confessional statement before the Inspector of Excise. The samples of the seized opium were drawn from both the packets separately, and two packets of samples were sent to the Chemical Examiner, Excise Department, Assam at Guwahati on 30.3.1996. The report of the Chemical Examiner shows that the seized contraband is opium. The Inspector of Excise, on the following day of the seizure, submitted a report about the search and seizure to the Commissioner of Excise. Offence report under Section 18 of the NDPS Act, 1985 was submitted in due course before the learned Special Judge. The learned Special Judge framed charges against both the accused persons under Section 18 of the NDPS Act. The charges were read over and explained to the accused persons to which they pleaded not guilty. During the course of trial, the learned Judge recorded the statement of two PWs and two DWs and, on completion thereof, convicted the accused persons as stated above.

5. P.W. 1 Shri Bhaben Sarma, Inspector of Excise, Sonari in his evidence stated that on 16.3.1996, in presence of Deputy Superintendents of Sonari and Nazira and other officials of the Excise Department of different stations, conducted a search in the house of the accused persons at Ward No.2 of Sonari Town in presence of independent witnesses, namely Hemanta Bora and Dhurbajyoti Mohanta. P.W. 1 deposed that the search was conducted in presence of both the accused as-well-as witnesses. The accused persons were informed that search was being carried out in pursuance of information that they were in possession of contraband. P.W.1 along Shri Pradip and Lachit, Excise Constables and independent witnesses Hemanta Bora and Dhurbajyoti Mohanta, entered the house of the accused and found one polythene packet containing 540 grams of opium in a meat-safe. It was seized and sealed in presence of the witnesses and the accused persons. Their signature were also obtained. The search party also recovered another packet from the bed room containing 100 grams of opium and a sum of Rs.2300/- being the sale

proceeds of opium. The opium as well as the cash amount of Rs.2300/- were also s eized. Ext. 1 is the seizure list in respect of seizure of both the packets of o pium. Ext. 1(1) is the signature of P.W.1, Ext.1(2) is his endorsement on the R. T.I. of accused Smt. Phuljari Devi and Ext.1(3) is the signature of P.W. 1 below the endorsement of LTI of accused Deva Kumar. Ext.1(4) is the signature of witn ess Hemanta Bora and Ext. 1(5) is the signature of witness Dhurbajyoti Mohanta. P.W.1 recorded the confessional statement of both the accused persons. Ext. 2 is the confessional statement of Smt. Phuljhari Devi and Ext.2(1) is the signature of P.W. 1 and Ext. 2(2) is the endorsement on the RTI of accused Smt. Phuljhari Devi. Ext. 3 is the statement of accused Deva Kumar, Ext. 3(1) is the signature of P.W. 1 and Ext. 3(1) is the signature of P.W.1 and Ext. 3(2) is his endorsem ent below the LTI of Deva Kumar. P.W. 1 sealed the seized opium and the cash amo unt. P.W.1 also proved M.Exts. 1 and 2, the two packets of opium and M.Ext.3, th e amount of Rs.2,300/- of different denominations. Ext.4 is the report of the Fo rensic Science Laboratory.

6. It would appear from the evidence of P.W. 1 that the search was conducted in presence of the excise officials and constables, and also two indep endent witnesses. The documents and material exhibits prove the fact that two po lythene packets containing 'opium' were seized from the residence of the accused Smt. Phuljhari Devi, and the same tested positive for opium as reported by the Chemical Examiner. The defence could not bring out anything from this witness to show that there has been procedural lapse in the search and seizure or that the prosecution suffers from any incurable vices.

7. The evidence of P.W. 1 is substantially corroborated by P.W. 2 S hri Hemanta Bora, an independent witness. P.W. 2 stated that he saw a gathering in front of the house of the accused. He went there and saw P.W. 1, his superior officers and other excise personnel conducting search in the house of the accu sed persons. P.W.1 showed him the polythene packets containing opium and, seized and sealed the packets vide Ext. 1. Ext.1(4) is his signature. P.W. 2 also prov ed his signature Ext. 1(3) on Ext. 1. To a query by the Court, P.W. 2 stated tha t at that time both the accused persons (identified in the dock) were also prese nt. In his cross-examination, he stated that he saw the packets of opium in the hands of P.W.1. P.W.2 fully corroborated the evidence of P.W.1 in so far the sea rch and seizure from the house of the accused persons are concerned. Mr.P. Bo ra, learned counsel argued that the evidence of P.Ws. 1 and 2 are contradictory. But this submission, in my opinion, is not worth accepting. I do not find any c ontradiction in their evidence on vital issues.

8. Both the accused persons in their examination under Section 313 Cr.P.C. stated that the confessional statement Ext.2 have not been recorded as p er their version and their thumb impressions were obtained by force. The confess ional statement recorded by P.W. 1 clearly show that the accused persons have ad mitted that the packets of opium were seized from their house. Accused Deva Kuma r in his confessional statement admitted the seizure of the packets of opium as well as Rs.2,300/-. The confessional statement (Ext.3) of Smt. Phuljhari Devi sh ow that accused Shri Deva Kumar is the younger brother of her husband and they l ive in the same house. It further appears from her confessional statement that o ne Shri Sitaram Singh of Village - Belonia, Aara District of Bihar used to supp ly opium to Deva Kumar, and Deva Kumar used to sell the same to the residents be longing to Naga community in the neighbourhood. In the same way, Deva Kumar admi tted that he used to get supply of opium from Shri Sitaram Singh and used to sel l the same to the people belonging to Naga community. The confessional statement s recorded by P.W. 1 further support the prosecution case.

9. Mr. Bora raised objection about the manner in which the confessi onal statements were recorded including competence of P.W.1 to report the same. Mr. Bora, learned counsel argued that the confessional statements were recorded in presence of police personnel and the signature of the accused persons were ob

tained by force. But from the evidence of P.W. 2, an independent witness, it app ears that there was a big gathering at the time of search. The signature of the accused persons were taken by P.W.1 on the seizure list as-well-as on the confes sional statements during the course of search and seizure in presence of not onl y the officials of the excise department, but also a large number of people as e vinced by P.W.2. None of them has been examined by the defence to prove the alle gation that their signature were obtained by force. The allegation of applicatio n of force appears to be unfounded.

10. Mr. Bora also relied upon a decision of the Apex Court in Abdul Rashid -Vs- State of Bihar (2001) 9 SCC 578 in order to show that confessional s tatement recorded by an excise officer vested with the powers of a police office r is not admissible in evidence. According to Mr. Bora, P.W. 1 being an Inspecto r of Excise was not competent to record any confessional statement in view of th e notification issued by the State Government vide Memo No.EX.145/85/291 dated 2 5th April, 1995 by which the Inspectors of Excise Department has been vested wit h the powers of Officer-in-Charge of a police station. I have considered the iss ue with reference to the judgment in Abdul Rashid (supra). There cannot be any d ispute that excise officers empowered to exercise powers of an Officer-in-Charge of a police station are not eligible to record confessional statement. Obviousl y, the Court cannot take into consideration the confessional statement (Exts.2 a nd 3) recorded by P.W.1 for the purpose of recording conviction. Even otherwise and de-hor the confessional statements, the evidence of P.Ws 1 and 2 prove that there was a seizure, and two polythene packets containing contraband were seized from the residential premises of the accused persons. The report of the chemica l examiner (Ext.4) also proves that the seized contraband tested positive for op ium. Under the circumstances, it has to be concluded that the accused persons we re in possession of opium, as alleged by the prosecution.

11. The defence examined two witnesses in this case. D.W.1 Shri Gita lal Sharma stated that the accused persons are his neighbours and they are potte rs by profession. Accused Deva Kumar lives at a distance of 100 cubits from the house of Smti Phuljhari Devi. He further stated that he never saw the accused pe rsons dealing in narcotic drugs. The evidence of D.W.1 does not make out any cas e in favour of the defence. He has not stated anything to show that there was no seizure of opium from the residence of the accused persons. Accused Deva Kumar nowhere in his examination under Section 313 Cr.P.C. stated that he is not resid ing with accused Smti Phuljhari. A casual statement of D.W.1 that he lives at a separate place cannot override the evidentiary value of the evidence of P.Ws. 1 and 2. For the same reason, the evidence of D.W. 2 Shri Marn Nath carries no imp ortance. His evidence is that the accused persons are potters and he never saw t hem dealing in narcotic drugs and they live separately. For the above reason, hi s evidence is also not worth accepting.

12. For the discussion above, this Court is of the opinion that the prosecution has succeeded in establishing the charge against both the accused pe rsons. The quantity of opium seized show that it is not covered by the definition of small quantity as defined in Section 2 (xxiiia) of the N.D. P.S. Act. Therefore, their conviction under Section 18(b) of the Act calls for n o interference.

13. The appeal is dismissed.

14. Before parting, Registry is directed to forward a copy of this J udgment to the Commissioner of Excise for initiating appropriate inquiry against Shri Shri Sitaram Singh of Village - Belonia, Aara District of Bihar who, acco rding to the accused persons, has been supplying opium for sale in the State of Assam.